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In the Supreme Court of the United States

No. 206

OCTOBER TERM, 1956.

JOHN H. LEONARD,
Petitioner,

vs.

STANLEY J. BOWERS,
Tax Commissioner of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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In Propria Persona for Petitioner.

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TABLE OF CONTENTS.

Opinions Below ---------- 2

Jurisdiction ---------- 2

Questions Presented ---------- 2

Constitutional Provisions Involved ---------- 3

Ohio Statutes Involved ---------- 4

Use Tax Law ---------- 4

Sales Tax Law ---------- 5

Licensing of Motor Vehicles Law ---------- 5

Statement of the Case ---------- 7

(a) Facts Leading to Payment of the Use Tax--- 7

(b) Proceedings to Recover the Use Tax------- 8

(c) Raising of the Constitutional Questions----- 9

Argument ---------- 9

(I) A Sales tax and a Use tax are different in kind 9

(II) The levy of a tax by a state on the right to use in the state an article purchased out-of-state and brought thereinto *while exempting* from the same tax the identical right to use in the state an article purchased in-state, imposes an impost on the imported article and discriminates against interstate commerce and deprives the purchaser of his property without due process of law and deprives him of equal protection of the laws ---------- 10

(III) The refusal by the state of a right for which one has qualified under one law because he has not complied with a totally unrelated law deprives him of property without due process of law, deprives him of equal protection of the law, and places him under duress ---------- 19

Summary 22

Conclusion 23

APPENDIX:

Decision and Opinion of the Ohio Board of Tax Appeals 25

Journal Entry of the Court of Appeals of Summit County 29

Order of the Supreme Court of Ohio Dismissing Appeal as of Right 30

Order of the Supreme Court of Ohio Overruling Motion for an Order Directing the Court of Appeals of Summit County to Certify Its Record 30

Order of the Supreme Court of Ohio Denying Application for Rehearing 31

TABLE OF AUTHORITIES.

Cases.

Henneford vs. Silas Mason Co., 300 U. S. 577, 81 L. Ed. 814, 57 S. Ct. 524 ..... 12, 15, 21

McLeod vs. J. E. Dilworth Co., 322 U. S. 327 (1944), 88 L. Ed. 1304, 64 S. Ct. 1023 ..... 9, 10, 21

State of Ohio vs. Fields, 10 Ohio Opinions 234 17

Constitution.

Constitution of the United States:

Article I, Secs. 8 and 10 ..... 2, 3

Amendment XIV, Sec. 1 3

Statutes.

Judicial Code, Sec. 1257 2

Ohio Revised Code:

Sec. 4503.02 ..... 5, 20

Sec. 4503.03 ..... 5, 20

Sec. 4503.04 ..... 6, 20

Sec. 4503.10 ..... 6, 20

Sec. 4503.11 ..... 6, 20, 21

Sec. 4503.19 ..... 6, 20

Sec. 4503.21 ..... 6, 20, 21

Sec. 4503.99 ..... 7, 20, 21

Sec. 5739.02 ..... 5, 15

Sec. 5739.03 5

Sec. 5741.02 4

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio (made final on March 7, 1956, by its order denying Petitioner's application for a rehearing), affirming the judgments of the Court of Appeals of the Ninth Appellate District of Ohio and of the Board of Tax Appeals of the State of Ohio, and affirming a final order of the Tax Commissioner of Ohio, which opinions and order denied Petitioner's claim for a refund of a Use tax which Petitioner had paid to the Clerk of Court of Summit County, Ohio, under the Ohio Use Tax law, which law, and the manner of collection of the Use tax imposed thereby, Petitioner claims to be in violation of his rights under the Constitution of the United States and an impost on, and interference with, interstate commerce.

OPINIONS BELOW.

The Supreme Court of Ohio did not render an opinion other than to state, in overruling Petitioner's Motion to Certify and in dismissing Petitioner's Appeal as of Right, that no debatable constitutional question was involved therein.

The Court of Appeals of the Ninth Appellate District did not render an opinion.

The Board of Tax Appeals rendered an opinion which is set forth in the attached Appendix.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on February 15, 1956. Petitioner seasonably filed an Application for Rehearing which was denied on March 7, 1956. The jurisdiction of this Court is invoked under Section 1257 of the Judicial Code. Time extended Reed

QUESTIONS PRESENTED.

1. Does not a state which levies a Sales tax on the right to acquire ownership and a Use tax on the right to enjoy the ownership acquired, taxes held by this Court to be different in kind, violate the Constitution of the United States by exempting from payment of the Use tax those who have paid the Sales tax in that:

(a) the levy of a Use tax on articles brought into the state for use therein while exempting from the Use tax like articles purchased in the state for the identical use therein constitutes an impost and discrimination against interstate commerce in violation of Sections 10 and 8, Article I of the United States Constitution; and

(b) a tax against one person for the enjoyment of a right of ownership of certain goods and exemp-

tion of others arbitrarily from a tax on the identical right of ownership of like goods, deprives that one of equal protection of the laws and takes his property without due process of law in violation of Section I of Amendment XIV of the United States Constitution.

2. Is not Petitioner who was fully qualified for certain rights under the Ohio Licensing of Motor Vehicles Law and was refused his rights thereunder by the state because he had not complied with the Use Tax Law which was held in the Opinion of the Board of Appeals (and affirmed by the Supreme Court of Ohio herein), to be in no way related to the Licensing of Motor Vehicles Law, thereby deprived of property without due process, deprived of equal protection of the law, and placed under duress?

CONSTITUTIONAL PROVISIONS INVOLVED.

The United States Constitution provides as follows:

ARTICLE I, SECTION 10—"No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws."

ARTICLE I, SECTION 8—"The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *."

AMENDMENT XIV, SECTION 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *."

OHIO STATUTES INVOLVED.

Use Tax Law.

Ohio Revised Code.

5741.00—Use Tax; Storage Tax.

5741.02—Levy of Tax; rate; exemptions.

"(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use or other consumption in this state of tangible personal property purchased for storage, use, or other consumption, in this state as follows:

* * * * *

(1) No tax, if the purchase price for which such property has been purchased is less than forty-one cents; * * *

(4) If such purchase price is in excess of one dollar, three cents on each full dollar thereof; * * *

(B) Each consumer storing, using, or otherwise consuming in this State tangible personal property purchased for such purpose shall be liable for the tax and such liability shall not be extinguished until the tax has been paid to the State; * * *

(C) The tax does not apply to the storage, use, or consumption in this State of tangible personal property purchased under the following circumstances:

(1) When the sale of property in this State is subjected to the Excise Tax imposed by the Sections 5739.01 to 5739.31 inclusive of the Revised Code * * *

(3) Property, the storage, use or other consumption of which this State is prohibited from taxing by the Constitution of the United States, laws of the United States, or Constitution of this State. This exemption shall not exempt from the application of the tax imposed by this section the storage, use or consumption of tangible personal

property which was purchased in interstate commerce, but has come to rest in this state, * * *."

Sales Tax Law.

Ohio Revised Code.

5739—Sales Tax.

5739.02—"Levy of Tax; purpose; rate, exemptions.

For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crisis * * * an excise tax is hereby levied on each retail sale made in this state of tangible personal property.

(A) The tax is as follows:

(4) If the price is in excess of one dollar, three cents on each full dollar * * * The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered."

5739.03—"Consumer to pay tax; prepaid tax receipts, Certificate of Exemption; Except as provided.

Except as provided in Section 5739.05 of the Rev. Code, the tax imposed by Section 5739.02 shall be paid by the consumer to the vendor. * * *"

(Note: 5739.05 refers to Powers and Duties of Tax Commissioner and prepayment of tax by vendors, not pertinent to present issues.)

Licensing of Motor Vehicles Law.

Ohio Revised Code.

4503—Licensing of Motor Vehicles.

4503.02—"Levy of Annual License Tax.

An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways, * * *."

4503.03—"The registrar of motor vehicles shall designate * * * deputy registrars who *shall* accept

applications for the annual license tax and assign distinctive numbers in the same manner as the registrar.

4503.04—"The rates of the taxes imposed by Section 4503.02 of the Revised Code shall be as follows:

(B) For each passenger car, ten dollars: Taxes at the rates provided in this Section shall be in lieu of all taxes on or with respect to the *ownership* of such motor vehicles, * * *"

4503.10—"Each owner of a motor vehicle * * * shall * * * cause to be filed * * * a written application * * * for registration * * * containing the following information: —

(F) Whether the fees required to be paid for the registration of transfer * * * have been paid.

At the time of making such application, the applicant shall present for inspection proper bills of sale * * *.

If such application is not in proper form, or if proper bills of sale * * * do not accompany the application, or if all registration and transfer fees for such motor vehicle * * * have not been paid, the license shall be refused."

4503.11—No person who is the owner * * * of a motor vehicle operated or driven on the public roads or highways shall fail to * * * pay the tax.

4503.19—"Issuance of Certificate of Registration.

Upon filing of an application for registration and payment of the tax therefor, the registrar * * * shall assign to such motor vehicle a distinctive number, and issue and deliver to the owner * * * a certificate of registration * * * and two number plates."

4503.21—No person who is the owner of a motor vehicle * * * shall fail to display the distinctive

number and registration mark, furnished by the director of highways for such motor vehicles * * *.

4503.99—"Penalties * * * (B) Whoever violates 4503.11 shall be fined * * *."

(C) Whoever violates 4503.21 shall be fined * * *."

STATEMENT OF THE CASE.

(a) Facts Leading to Payment of the Use Tax.

On or about December 28, 1953, your Petitioner, John H. Leonard, a resident of Hudson, Ohio, purchased at retail sale from a dealer in Florida, an automobile for use later in Ohio. The automobile was later brought into the State of Ohio and used therein.

Petitioner applied to the Clerk of Court of Summit County, Ohio, as provided by law, for a 1954 license for said automobile, tendering the Clerk the required license fee and a Certificate of Ownership issued to the Petitioner by the State of Florida. The Clerk refused to issue a license because the Petitioner had not paid the Ohio Use tax, cautioned Petitioner that the operation of the automobile without the 1954 license would subject Petitioner to criminal prosecution, and informed Petitioner that the Use tax was levied against Ohio citizens purchasing articles outside of the State, and was the same in amount as the Sales tax levied against citizens of Ohio purchasing articles within the State, and that in no event was a citizen required to pay both taxes on the same article.

Petitioner paid the Use tax of $110.40 under protest and under the duress of being refused a license for 1954 until he had paid the Use tax and of becoming subject to criminal prosecution if he should operate the automobile without the 1954 license.

(b) Proceedings to Recover the Use Tax.

Petitioner filed a claim for refund before the Tax Commissioner of the State of Ohio. The claim was refused. Thereupon Petitioner appealed to the Board of Tax Appeals which refused the claim and rendered an opinion designated "Entry" (See Appendix hereto, p. 25.)

Petitioner then appealed to the Court of Appeals of Summit County, Ohio. That Court affirmed the judgment of the Board of Tax Appeals without opinion, overruled Petitioner's Motion for Reconsideration and Clarification, and for Rendition of a Written Opinion, and refused to approve a proposed Journal Entry submitted by Petitioner which Petitioner believed would have led to clarification of the issues. At this point Petitioner was without knowledge or clues as to the legal basis of the court's decision and as to the specific issues intended to be decided by the Court of Appeals. The Notice of Appeal to the Court of Appeals, Motion for Reconsideration etc., and the proposed Journal Entry, are set forth in the Record.

Petitioner then appealed to the Ohio Supreme Court by an Appeal of Right and by a Motion to Certify the Record, both of which, for lack of clear disposition of the issues below, were based on the assumption that each and every issue raised below had been decided adversely to Petitioner. The Supreme Court of Ohio denied the Appeal as of Right and overruled the Motion to Certify. (Appendix p. 30.) Petitioner filed an Application for Rehearing in which he pointed out the issues which he believed to have been raised and the reasons why he believed that Court could and should have clarified its position relative thereto. The Application for Rehearing was denied. (Appendix p. 31.) The Motion to Certify and Application for Rehearing are contained in the Record.

(c) Raising of the Constitutional Questions.

The Constitutional Questions, except Question 1(a), were raised in the following pleadings, all of which are contained in the Record:

> Exhibit A accompanying the original claim for refund, as filed; the Assignment of Errors in the Notice of Appeal to the Board of Tax Appeals; the Notice of Appeal to the Court of Appeals of Summit County; the Motion For Reconsideration and Rendition of Written Opinion by the Court of Appeals of Summit County; the Assignment of Errors of the Motion to Certify the Record of the Court of Appeals and the Appeal as of Right; and the Application for Rehearing before the Ohio Supreme Court.

Question 1(a) was first raised specifically in the Motion for Reconsideration and Rendition of a Written Opinion by the Court of Appeals and was raised before the Ohio Supreme Court in the Assignment of Errors accompanying the Motion to Certify the Record of the Court of Appeals of the Appeal as of Right, and in the Application for Rehearing.

ARGUMENT.

(I) A Sales tax and a Use tax are different in kind.

Neither the right of a state to levy a Sales tax on a retail sale occurring within its boundaries nor the right of a state to levy a Use tax for the use and storage of an article within its boundaries, after the article has come to rest therein permanently, is in issue.

It is held by this Court in *McLeod vs. J. E. Dilworth Co.*, 322 U. S. 327 (1944), 88 L. Ed. 1304, 64 S. Ct. 1023, that a Sales tax and a Use tax are different in conception and are assessments upon different transactions, a Sales tax being a tax on the freedom of purchase and a Use tax

being a tax on the enjoyment of that which was purchased, that this difference is not a matter of nomenclature but of substance, and that though the two taxes may secure the same revenues and serve complementary purposes, they are taxes on different transactions and for different opportunities afforded by the state.

According to the cited *McLeod* case, the Sales tax and Use tax are based on entirely different rights, the Sales tax being a tax on one's *right to acquire* an article owned by another and the Use tax being a tax on the *right to enjoy* one's *ownership* of an article after acquisition,—rights which cannot coexist in the same person for the same article. These taxes are *different in kind.*

(II) The levy of a tax by a state on the right to use in the state an article purchased out-of-state and brought thereinto while exempting from the same tax the identical right to use in the state an article purchased in-state, imposes an impost on the imported article and discriminates against interstate commerce and deprives the purchaser of his property without due process of law and deprives him of equal protection of the laws.

Question 1 arises because, under the Ohio Use tax Law, the state levies a Use tax for use and storage in the state of an article permanently at rest in the state, but *only* if it was purchased out-of-state where it could not be taxed a Sales tax at the time of purchase, and exempts from the Use tax a like article permanently at rest in the state but which was purchased within the state for identical use and storage therein, and which was taxed a Sales tax under the Ohio Sales tax Law.

The state has the right to levy a Use tax against the right of use and storage of articles permanently at rest in

the state if levied without regard to their situs of acquisition and without regard to other taxes, different in kind, that may have been levied against other rights respecting the articles. It is the law's *exemption* from a Use tax on a right of ownership in view of payment of a Sales tax on the wholly different right of freedom of acquisition that discriminates against the imported article and its owner.

When either the law or its manner of enforcement thus exempts the attributes of ownership of those articles purchased in the state from the same tax it imposes on the same attributes of ownership of like articles purchased out of the state, it discriminates against the latter, imposes an impost or duty of import on the out-of-state purchases, and interferes with interstate commerce.

The Sales tax and a Use tax being thus different in kind, the exemption from the Use tax simply because the Sales tax has been paid is arbitrarily discriminative against the out-of-state purchaser, and deprives him of his property without due process of law and deprives him of equal protection of the laws.

The discrimination and unconstitutionality exist because an inherent right of ownership is made contingent upon payment of a tax on that right in the case of an article purchased out-of-state but the same inherent right is maintained intact, free from tax, in the case of a like article purchased in-state. This discrimination is not eliminated by levying a Sales tax on the right of freedom of purchase which is in no way an attribute of ownership but which, in fact, denies the existence of ownership in the potential purchaser. By this action of the state, the out-of-state purchaser is deprived of his property without due process of law and is deprived of his right to equal protection of the laws.

In *Henneford vs. Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814, 57 S. Ct. 524, the Court considered a Use tax law of the State of Washington by which the state levied a Use tax on the use of products imported from other states and excepted property the sole use of which had already been taxed an equal or greater tax by Washington or a sister state. It held this to be a non-discriminatory Use tax and proper.

The Court recognized therein that the Use tax and Sales tax were different in kind but seemed to emphasize equality in the amount of money collected, saying

> "Equality is the theme that runs through all sections of the Statute * * * The stranger from afar is subjected to no greater burdens as a consequence of ownership than the dweller in the State. There is no discrimination."

The Court appears to have reached this conclusion because the Washington Statute allowed an off-set for like tax paid elsewhere,—something the Ohio Use tax law in question does not do. The Court said there was no need to decide what happens if a taxpayer paying in a sister state is required to pay again, because the statute avoids that possibility. Thus the Court did not decide about a law similar to that of Ohio which grants no such exemptions.

The Court's decision in the *Henneford* case is believed to be unsound in some respects. It has the effect of making the rights of a citizen of the State of Washington depend on what sister states may choose to do. So far as his own state is concerned, he retains intact his right of use and storage if the sate of purchase levied a Sales tax equal in amount to the Washington tax, and loses, subject to redemption by paying a Use tax, his right of use and

storage if the state of purchase did not levy a tax. And this would remain true even though, in former instance, he self-evidently had not contributed in any way to helping the State of Washington maintain those facilities which make the use of an automobile in Washington possible or desirable.

How can the Washington statute "equalize the burden" of the stranger from afar with that of the local citizens when the latter bear the financial burden of the State in paying for protection and facilities for use, and the stranger does not share that burden in the least, but, instead, happens to have paid a like amount of money to a sister state whose facilities he may or may not use?

The tax burden assessed by the State of Washington simply is not equalized by this procedure.

This points up the fact that equality in the amount of money paid in taxes is not a sound criterion for taxation. To equalize the burden, each citizen should be taxed on the same basis, herein the right to use in the state,—and the Sales tax eliminated or not as the state may see fit, but not applied in some instances and withheld from application in others. If, in addition to a Use tax levied on a basis of use in the state, the state should impose a Sales tax levied on the basis of purchase in the state, each tax would rest on a sound non-discriminatory basis.

Petitioner raised below the matter of discriminatory state statutes applied to citizens of the state for different acts,—an act of purchase and an act of use—occurring wholly within the state, and the Board of Tax Appeals held that to countenance Petitioner's theory would be causing discrimination instead of preventing it because Petitioner would escape paying both a Use tax and a Sales tax while other Ohio residents would have to pay the Sales tax. What

the Board seemed not to realize is that because the state *cannot* lawfully tax those making out-of-state purchases, it is not discrimination by the State to levy a Sales tax only on those making purchases within the State, whereas, since it *can* lawfully tax in-state *use*, it is discrimination to levy a Use tax only on *part* of those enjoying such use. A state does not discriminate by refraining from levying a tax beyond its boundaries which it has no right to levy. The fact that Petitioner might not have to pay either tax is not germane. Nor would it be discriminatory if others had to pay a Use tax even though they had already paid a Sales tax.

Apparently, the Board held that if a valid law imposes a Sales tax on one citizen, an invalid law or illegal course of action is justified, in the interest of uniformity of amount paid to the state, to make another citizen not falling within the former law pay a like amount of money to the state under some other law and for some other reason unrelated to the Sales tax. In short, it seems to hold the result of uniformity in the amount of tax money paid by each citizen justifies illegal means of taxation.

The fact that a retail Sales tax can readily be avoided by making purchases out-of-state does not justify the imposition, in the present *discriminatory fashion*, of an entirely different type of tax such as one based upon use and storage within the state.

Though it is the right of a citizen to purchase articles out-of-state, the Board stated that *it is to stop such practice* and to make application of the law uniform, that these tax Statutes in question were passed. If these are the reasons for passing the Use tax and the Use tax is, in fact, a Sales tax, a subterfuge by the state, it is an unauthorized extension of the taxing power of the state beyond its own borders. If the Use tax is, in fact, a tax on a right of owner-

ship instead of on a right to acquire ownership, and different in kind, not nomenclature, from a Sales tax, it cannot be excused lawfully as to some who happen to have been taxed on the right to acquire, a right which is different in kind from the right to enjoy.

The *Henneford* case may have been one which reluctantly bowed to the awful necessity of collecting enough tax money to survive in a then depressed economy seeking to recover from an almost lethal blow. Unquestionably, the pressure was severe; survival was the stake. But because a constitutional right may be *temporarily* denied or circumscribed in the *presence of a clear and present danger*, such cannot be permanently denied or circumscribed when the danger has ceased, and decisions made in view of dangers then existing should not be allowed to stand as a precedent when the danger has passed. (Strangely, the Ohio Sales Tax Law still pretends to be rooted in the "existing economic crises" in these, our years of greatest prosperity.) (See Ohio Rev. Code 5739.02.)

But the cited cases hold that the Sales tax and Use tax are differently based,—different in kind. The Use tax is either a Sales tax in disguise or it is not. If it is, it is an attempt to extend the taxing authority of the state beyond the state boundaries and, therefore, is unconstitutional. If it is not, but instead is a tax, in fact, on use and storage,—on an "attribute of ownership" rather than on "freedom of acquisition"—then it must apply equally to all persons making like use and storage of like articles, and since those paying a Sales tax on a different right are excused, the Use tax thereupon becomes discriminatory and unconstitutional. Whichever horn of the dilemma it seeks to hang onto for avoidance of illegality, it cannot escape, as both horns are those of unconstitutionality.

It will not escape the attention of this Court that once it becomes established as a principle that to meet a state's economic needs, one can be taxed on a right as to which others are exempt because they have paid a different tax on a wholly different right, the legal mongrels which may be begotten by this miscegenation of economics and illogic may one day drown out the voice of reason and supplant the worship of justice with genuflection to expediency.

It seems that the tax burden would be equalized by each state taking the seemingly logical step of eliminating the Sales tax and levying on all equally a Use tax, or by levying both taxes and not excusing payment of one in view of payment of the other. The only inconvenience to the state would be that in the case of a Use tax levy, the state might have to show that the automobile was to be used in the state,—possibly a burden which expediency would dictate should be avoided even though to do so would override the rights of citizens, when a sale in the state is so conveniently self-proving.

The Use tax deprives Petitioner of equal protection of the laws. He is entitled to use and store tangible personal property in the state on the same terms as others. The state cannot deprive him of this right which is shared by all as a recognized inherent attribute of ownership of the property for the protection of which the state exists. To tax him a sum of money for the doing with his property exactly what other owners do with like property free of that tax is to take from him part of the protection of the law which is a concomitant of ownership without taking from others that same concomitant. It is an attempt, purposeful and discriminatory, by the state to seize from one citizen a right guaranteed equally to all and force that one

to repurchase his right from the state under penalty of the seizure being made permanent if he does not.

Here, it might be interposed, that precedent can be found to the effect that if a law applies equally to all in a particular group or class it does afford equal protection of the law. Such precedents possibly led to statements, such as in *State of Ohio vs. Fields*, 10 Ohio Opinions 234 (235), that a taxing act is not invalid because *greater exemptions are allowed* than the Legislature was required to allow.

Any such precedents are founded on a faulty logic and a subversion of substance to form. Self-evidently, if equal protection of the law requires merely that the law apply equally to all in the class defined by a statute in question, the Constitution of the United States can, in effect, be eroded away completely by state legislation. All that would be necessary would be for the state legislature to qualify to a sufficient degree the class exempted in order to eliminate all but an identified individual against whom it is desired to discriminate. In effect, a state legislature could repeal the amendments one by one by class definitions and exemptions, with charity toward some, fairness toward others, and malice toward a preselected few. This would make the various states the masters, not the servants of their citizens,—something the Constitution was designed to prevent.

To say the foregoing is not sound because if any defintion of class and consequent exemption were arbitrary and malicious, it would be an unlawful abuse of legislative power is tantamount to saying that the original premise is unsound and its supporting logic is untenable, and that the true premise for equal protection is not whether or not the law applies equally to all in the defined class, but whether the law does, in substance, apply equally to the enjoyment of identical rights regardless of who the owner happens to

be, of how and where he acquired the property, and of his other unrelated rights and tax burdens. To say that a law is not arbitrary if it applies equally to all within its defined class unless the exemptions from the defined class are arbitrary, is merely to say that it is not arbitrary if it is not arbitrary,—but to beat about the bush concerning something axiomatic is apt to result in equating substantive rights and semantics. What is implicit in the foregoing statements is that the tax is arbitrary unless identical rights in respect of an article are taxed identically no matter in whose hands they may happen to be lodged, no matter what taxes may have been levied against other and different rights of the owner in the article, and no matter where the rights were obtained.

For the same reasons, Petitioner is deprived of his property without due process of law. He has a right,—an attribute of ownership—which is to use, store, and enjoy his property in the state, in common with all others. This right arises under the law by virtue of his ownership of the property, not by virtue of the manner or situs of its acquisition or of the tax he has paid on other unrelated rights. To deprive him of this right of use and enjoyment because of the manner and situs of acquisition or payment of taxes on unrelated rights unless he pays a special tax, while permitting others to retain the same right free of the same tax, deprives him of his property without due process of law and of equal protection of the laws.

That the state may be unable to conceive of any way to tax him a Sales tax which it taxes against in-state transactions and which is based on the right of acquisition of the property does not justify its penalizing his enjoyment of ownership of his property.

In considering these constitutional provisions, it must be borne in mind, as set forth by the Board, that the sole

reason for passing the Use tax was to complement the Sales tax law under which, because citizens could not be taxed on out-of-state mercantile transactions, they could escape a Sales tax by making out-of-state purchases. But this is an attempt to empower the state to levy a totally different tax on the out-of-state purchases simply because some citizens might exercise their Constitutional rights to purchase goods wherever in the United States they see fit and expect to have their ownership respected and protected under the laws of every state without favoritism to them and without discrimination against them. The Respondent contended below that the *sole* purpose of the Use tax was to extract from out of state purchasers, to whom its retail Sales tax could not be applied, an equal amount of money,—even though on an entirely different basis of taxation.

It might well be asked how a tax on the right to use and store an article owned by a person can be made dependent solely upon the situs at which that ownership was acquired and not at all upon the manner of use and storage?

(III) The refusal by the state of a right for which one has qualified under one law because he has not complied with a totally unrelated law deprives him of property without due process of law, deprives him of equal protection of the law, and places him under duress.

The manner of collection of the Use tax deprives Petitioner of his property without due process of law, deprives him of equal protection of the laws, and amounts to duress.

The Board of Tax Appeals held that the Ohio Use Tax Law and the Ohio Licensing of Motor Vehicles Law (Ohio

R. C. 4503) are in no way related. It is because of this that the question arises whether, since Petitioner tendered the necessary documents of ownership and the necessary fee for a license for a vehicle under the Licensing Law, he properly was refused the right to the license because he had not paid a tax under a Use Tax Law or the Sales Tax Law,—laws "in no way related" to the Licensing Law.

The rights of citizens cannot be thus annihilated. In principle, this could be carried sufficiently far to deprive a person of his right to resort to the courts to enforce a contract until he had paid a personal property tax, or to deprive him of his right to a driver's license until he had paid alimony to a divorced wife. Though such examples may be extreme, if the principle is sound, they logically must follow.

The Petitioner had the right to receive a vehicle license under the Licensing Law when he tendered the necessary fee and evidence of ownership. (See Ohio Rev. Code 4503.02-04, 4503.10, 4503.19, 4503.11, 4503.21, 4503.99, *supra.*) He was refused that right arbitrarily because he had not paid a Use Tax under a law recognized by the state to be in no way related to the Licensing Law. Thereby he was deprived illegally of his right under the Licensing Law.

Can it be questioned that it is not duress for the state to "persuade" a citizen to comply with one law by withholding from him, until he does so, the rights to which he is entitled under a totally unrelated law?

Would it not be duress to deprive one of his legal right to travel about the state until he had paid his personal property tax, or to force one to pay his real estate tax by refusing him the right of fully contracting in the marts of trade until he had done so?

The Respondent contended before the Board and Court of Appeals that threats alone, or threats to resort to legal action do not constitute duress, but the threat in this instance was not a threat "alone" but a threat of criminal action by a powerful state accompanied by the obvious power and will to put into effect promptly the act threatened (Rev. Code 4503.11, 4503.21, 4503.99, *supra*).

The present Use tax was collected illegally without any opportunity for prior judicial determination as to whether or not it is legal and without a hearing in which the issues could have been raised, unless Petitioner would have deliberately subjected himself to criminal prosecution under Rev. Code 4503.99 and to temporary loss of his right to operate his automobile.

Thus Petitioner was not afforded a free civil right of contest but was put in the position of becoming criminally liable under the laws of the state on a totally unrelated matter unless he paid a Use tax to the state and later sought to recover it.

Even a constitutionally vested power can be misused in a manner which is illegal or unconstitutional and even if the Use tax should be held constitutional, the manner of its collection is unconstitutional. Purposeful discrimination in the application of even a valid statute deprives one of equal protection of the laws.

It should be noted that the Licensing Law provides that the tax it levies shall be in lieu of *all taxes on or with respect to ownership* of the motor vehicle,—*yet the Use tax in question is a tax on an attribute of ownership.*

In view of *McLeod vs. J. E. Dilworth Co.*, and *Henneford vs. Silas Mason Co., supra,* holding that a Use tax is a tax on the enjoyment of *ownership* of an article, can a state collect a Use tax from, or if already paid refuse to

refund it to, a person who has paid an automobile license tax under the Ohio Licensing of Motor Vehicles Law which states that the taxes under the Licensing Law are in lieu of all taxes on or with respect to *ownership* of the motor vehicle?

SUMMARY.

Petitioner acquired an automobile out-of-state and was refused the usual operating license for the automobile until he paid a Use tax. The Use tax is levied on the right to enjoy the ownership of tangible personal property after it comes to rest in the state of Ohio. The State of Ohio also levies a Sales tax on the retail purchases within the State of Ohio of tangible personal property, this Sales tax being a tax on the right of acquisition and not an ownership.

The State of Ohio exempts one paying the Sales tax on the *right to acquire* an automobile from payment of the Use tax on the *right to enjoy the ownership* of the automobile after it is acquired. No issue is raised as to the right of a state to levy each of the taxes.

It is Petitioner's position that, by exempting those paying a Sales tax from payment of the Use tax, the state discriminates against him because he thereby is forced to pay a tax on his right to use the automobile, an attribute of ownership, and others are exempt from paying a like tax on a like use. The Use tax is assessed only against out-of-state purchases. The exemption of those making in-state purchases from payment of the Use tax amounts to an impost on automobiles brought into the state from a sister state and an interference with interstate commerce. It deprives Petitioner of his property without due process of law and deprives him of equal protection of the laws.

The Ohio Licensing of Motor Vehicles Law levies a license tax in lieu of any other tax with respect to the

ownership of an automobile. The Use tax, however, is a tax on an attribute of *ownership* and has been so held by the United States Supreme Court. Therefore, the Petitioner against whom there has been levied a Use tax and also the license tax is deprived of his right under the Licensing Law in that he must pay an additional tax with respect to ownership, contrary to that statute. Also, he is deprived of equal protection of the laws as compared to those who pay a Sales tax because, when they pay the Sales tax, they are not paying any other tax with respect to the right of ownership but only a tax with respect to the right of acquisition.

Further, the application of the law by the state's refusal to issue the Petitioner a license, though he qualified under the law, because of his failure to have paid a totally unrelated Use tax, discriminates against him, deprives him of equal protection of the law, and of his property without due process of law, and amounts to duress in the collection of the Use tax, regardless of whether the Use Tax Law and Licensing Law are valid or not.

CONCLUSION.

The decision of the Supreme Court of Ohio, affirming the Board of Tax Appeals, is manifestly in error in view of the decisions of this Court, and the protection meant to be afforded by the United States Constitution, and the questions herein presented should be resolved and clarified by this Court in the general public interest and to meet the ends of justice in the present cause.

For the foregoing reasons this petition for a writ of certiorari should be granted.

WHEREFORE, Petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court

directed to the Supreme Court of the State of Ohio commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record below, and that the decision of the Supreme Court of Ohio be reversed, and that the Petitioner shall have such other and further relief as may be just.

JOHN H. LEONARD,
1562 Hanna Building,
Cleveland 15, Ohio,
In Propria Persona for Petitioner.

APPENDIX.

DECISION AND OPINION OF THE OHIO BOARD OF TAX APPEALS.

(Entered October 13, 1954; readopted as final entry of November 9, 1954.)

This appeal stems from a final order of the Tax Commissioner under date of July 19, 1954, by which appellant's application for a refund of use taxes was denied.

The cause now comes on for further and final consideration upon the Tax Commissioner's transcript, appellant's notice of appeal, a stipulation of facts and appellant's brief.

Appellant, a resident of Hudson, Ohio, made a business trip to Fort Lauderdale in December of 1953. On his road South his car displayed serious driving trouble. He decided to purchase a new car for his return trip. The purchase price of a new Ford convertible purchased was $3,680.03. He paid $2,330.00 in cash, and received a credit trade-in value for his old car of $1,350.03. His old car, upon which he had paid the 3% sales tax at time of purchase, had been purchased from an Ohio dealer. It is said in the stipulation that "the automobile was purchased to be used in Ohio and has been used in Ohio." When appellant thereafter applied to the Clerk of Courts of Summit County for a 1954 license, he tendered only the required license fee. The clerk told him at the time that a license could not be issued until he had paid the Ohio use tax on the purchase price of the new car, and further advised him that if he drove his car without a license he would be subject to prosecution. The clerk further advised appellant that the use tax was levied against a resident of the State of Ohio who purchased a car outside the State for use

therein, but that other citizens who purchased cars within the State and paid the sales tax were not required to pay the use tax. Appellant then paid the 3% use tax amounting to $110.40 under protest and under duress of being refused a license. It is this sum of $110.40 which appellant seeks to recover by his application for refund, and which the Tax Commissioner denied.

Appellant sets forth and complains of the following claimed errors. (1) He says that the use tax in controversy is illegal and unconstitutional because it discriminates against certain citizens of the State and does not apply equally to all; that it is arbitrary in that the payment and amount of the tax are unrelated in any way to the use and benefit of the car to and by the appellant; that it is an attempt on the part of the State to levy a sales tax, by subterfuge, on a sales transaction without and beyond the jurisdiction of the State; and that it is double taxation to the extent that it is levied against that part of the selling price of the vehicle represented by the vehicle trade-in on the purchase and on which trade-in a sales tax had already been paid to the State. (2) It is further insisted that the manner in which the use tax was collected is illegal. By reason of these matters it is said that the Tax Commissioner erred in refusing his application for refund.

We gain the knowledge from appellant's communications to the Commissioner and this Board that as an attorney he is engaged in the practice of patent, trade-mark and copyright law. His claims of error display unfamiliarity with sales and use taxation law. Every claim made, as we understand it, has been conclusively established adversely to appellant's conception of the law. Nevertheless, for appellant's benefit, the Board proposes to make some brief comment concerning sales and use taxation law.

In the first place appellant does not question the right of a State to impose a sales tax on retail sales made within the State. It is well settled in this State that sales and use taxes are imposed upon consumers of goods sold at retail. When Ohio enacted the Sales Tax Act it soon thereafter found that it was defective and being avoided by the purchase of goods (particularly motor vehicles) by residents of the State in an adjoining State, and that they were then brought into Ohio and used and consumed in Ohio. To stop such practice and make application of the law uniform the legislature then passed the Use Tax Act (G. C. Sections 5546-25 to 5546-50, inclusive, Revised Code Sections 5741.01 to 5741.22, incl.) to complement the Sales Tax Act. Both Acts have frequently been before the State Supreme Court and have consistently and uniformly been recognized as constitutional measures and continuously enforced.

We shall refer to but one of many reported cases of the Supreme Court of the United States. When the case of *Gregg Dyeing Company v. Query, et al., Members of the South Carolina Tax Commission*, 286 U. S. 472, 76 L. Ed. 1232, is examined, and numerous other cases therein noted, it will be perceived that similar acts of sister States and like portions thereof, and of which appellant now complains, have consistently been held constitutional. We quote the third syllabus of the *Gregg* case:

> "No unconstitutional discrimination against transactions in interstate commerce is created by a state statute subjecting to a gallonage tax gasoline and like petroleum products purchased in other states and brought into the state and stored to be there used and consumed, where a tax of the same amount is levied on gasoline sold by dealers in the state and on gasoline used in the state by producers thereof."

Appellant says that he purchased his car in Florida with the definite purpose of bringing it into Ohio for use and consumption. Purchasers of motor vehicles from resident dealers pay a 3% sales tax. Appellant paid no such tax in Florida. To countenance his theory of the law would effect discrimination instead of preventing such. He would escape paying both sales and use tax while the Ohio resident purchasing in Ohio must and does pay the 3% sales tax.

Appellant confuses the Sales and Use Tax Laws with Ohio's Annual License Tax Law. The former are consumers' tax statutes having no connection with a motor owner's use of the public roads and streets. The Annual License Tax Law not only compensates the State for the use of its public ways, but is also in lieu of an annual personal property tax on the motor vehicle owned and used in business, if it be so used. The Sales and Use Tax Acts are in no way related to the annual licensing law.

We direct appellant's attention to the definitive section of the Use Tax Act, General Code Section 5546.2, now Revised Code Section 5741.01, and particularly to the definition of the word price.

> " 'Price' means the aggregate value in money of any thing, or things, paid or delivered, or promised to be paid or delivered by a consumer to a seller in the consummation and complete performance of the transaction by which tangible personal property shall have been purchased for storage, use, or other consumption in this state, without any deduction therefrom on account of the cost of the property sold, * * *."

If the price received for the trade-in were to be excluded from the price of the property purchased, the parties to the sale might consider that the trade-in value represented 99% of the "price" paid. If such were permissible

a very convenient way would be available to perpetrate fraud and avoid the tax.

What the clerk of courts said to the appellant was but a correct statement of the law of the State as it now exists. It was not duress or illegal pressure employed for the collection of a just and uniform tax of 3% which the law prescribed that he shall collect. Appellant should have been grateful and not chagrined and coerced into payment of the tax demanded. He was simply warned of the position in which he might find himself if he did not comply with the law. There is no vestige of double taxation present.

The order of the Tax Commissioner must be and is affirmed.

JOURNAL ENTRY OF THE COURT OF APPEALS OF SUMMIT COUNTY.

(Dated November 29, 1955.)

This cause came on to be heard on the appeal of the appellant under the provisions of Section 5717.04, Revised Code, from the decision of the Board of Tax Appeals entered November 9, 1954, and the same was submitted to the court upon the certified transcript of the record of the proceedings before the Board, the briefs and arguments of counsel, and the court upon consideration thereof finds that the decision of the Board of Tax Appeals is reasonable and lawful and that said decision should be affirmed.

It is therefore ordered, adjudged and decreed that said decision of the Board of Tax Appeals be and the same hereby is affirmed. It is further ordered that the costs of this appeal be taxed against the appellant.

To all of which appellant excepts.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL AS OF RIGHT.

(Entered February 15, 1956.)

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Summit County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant his costs herein expended, taxed at $_____.

ORDERED, That a special mandate be sent the Board of Tax Appeals, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Summit County, "for entry."

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS OF SUMMIT COUNTY TO CERTIFY ITS RECORD.

(Entered February 15, 1956.)

It is ordered by the Court that this motion be, and the same hereby is, overruled.

ORDER OF THE SUPREME COURT OF OHIO DENYING APPLICATION FOR REHEARING.

(Entered March 7, 1956.)

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

FILED
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JOHN T. FEY, C

No. 206.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

JOHN H. LEONARD,

Petitioner,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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MIDWEST LAW PRINTERS AND PUBLISHERS, INC., COLUMBUS 15, OHIO

INDEX.

Opinion below 2
Statutes involved 2
Statement of the case..... 6
Argument 7
I. The Ohio use tax does not violate Article I, Sections 10 and 8, nor Section 1 of the Fourteenth Amendment to the Constitution of the United States..... 7
II. The second question raised by the petitioner was not necessarily involved in the decision of the Ohio Supreme Court 9
Conclusion 10

Cases Cited.

Curry v. McCanless, 307 U. S., 357, 83 L. Ed., 1339.... 7

Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U. S., 62, 83 L. Ed., 488..... 7

Henneford v. Silas Mason Co., 300 U. S., 577, 57 S. Ct., 524, 81 L. Ed., 814.....7, 8, 9

Minnesota v. Blasius, 290 U. S., 1, 54 S. Ct., 78 L. Ed., 131 7

Southern Pacific Co. v. Gallagher, 306 U. S., 167, 59 S. Ct., 389, 83 L. Ed., 586..... 7, 8

Statutes Cited.

Revised Code of Ohio—
Section 4505.06 ..... 2, 10
Section 5739.02 ..... 3, 7
Section 5741.02 3
Constitution of the United States, Section 1, Fourteenth Amendment 9

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JOHN H. LEONARD,

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STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The respondent in the above entitled cause, for his brief in opposition to the petition for certiorari to the Supreme Court of Ohio, respectfully states the following:

OPINION BELOW.

The Supreme Court of Ohio on February 15, 1956, dismissed the petitioner's appeal as of right for the reason that no debatable constitutional question was involved, 164 Ohio St., 578, and on the same date overruled the petitioner's motion to certify the record.

STATUTES INVOLVED.

Section 4505.06, Revised Code of Ohio:

> "Application for a certificate of title shall be made upon a form prescribed by section 4505.07 of the Revised Code, and shall be sworn to before a notary public or other officer empowered to administer oaths. Such application shall be filed with the clerk of the court of common pleas of the county in which the applicant resides if the applicant is a resident of this state or, if not a resident, in the county in which the transaction is consummated. * * *
>
> "The clerk, except as provided in this section, shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless prepaid tax receipts required by section 5739.03 of the Revised Code are presented with the application in the manner and form to be prescribed by the tax commissioner or unless the applicant submits with the application, payment of such tax by cash, certified check, draft, or money order payable to the clerk who shall issue a receipt in the form prescribed by the commissioner, or a receipt issued by the commissioner showing the payment of the tax. * * *

"* * * When the transfer to the applicant was made in some other state or in interstate commerce, the clerk, except as provided in this section, shall refuse to issue any certificate of title unless the tax imposed by section 5741.02 of the Revised Code has been paid as evidenced by a receipt issued by the commissioner, or unless the applicant submits with the application, payment of such tax by cash, certified check, draft, or money order payable to the clerk. * * *"

Section 5739.02, Revised Code of Ohio:

"* * * an excise tax is hereby levied on each retail sale made in this state of tangible personal property.

"(A) The tax is as follows:

"(1) No tax is imposed if the price is less than forty-one cents;

"(2) Two cents, if the price is more than forty but not more than seventy cents;

"(3) Three cents, if the price is more than seventy cents but not more than one dollar;

"(4) If the price is in excess of one dollar, three cents on each full dollar and in addition, one cent if the price exceeds an even number of dollars by more than eight but not more than forty cents; two cents if such excess is more than forty but not more than seventy cents; and three cents if such excess is over seventy cents.

"The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

Section 5741.02, Revised Code of Ohio:

"(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use,

or other consumption in this state of tangible personal property purchased for storage, use, or other consumption in this state, as follows:

"(1) No tax, if the price for which such property has been purchased is less than forty-one cents;

"(2) Two cents, if such price is more than forty cents and not more than seventy cents;

"(3) Three cents, if such price is more than seventy cents and not more than one dollar;

"(4) If such price is in excess of one dollar, three cents on each full dollar thereof; and if such price is not an even number of dollars, then, in addition to said tax on each full dollar, one cent, if such price exceeds an even number of dollars by more than eight cents, but not more than forty cents; two cents, if such excess is more than forty cents and not more than seventy cents; and three cents, if such excess is over seventy cents.

"(B) Each consumer, storing, using, or otherwise consuming in this state tangible personal property purchased for such purpose, shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state; provided that a prepaid tax receipt, given to the consumer in accordance with section 5741.04 of the Revised Code, or the prepayment of the tax in accordance with section 5741.06 of the Revised Code shall relieve the consumer from further liablity for the tax to which such receipt refers.

"(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property

purchased under the following described circumstances:

"(1) When the sale of property in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31, inclusive, of the Revised Code, and when said excise tax is expressly made inapplicable to the sale of property in this state by divisions (B) (1), (B) (2), (B) (4), (B) (6), (B) (7), (B) (8), (B) (9), (B) (13), (B) (14), and (B) (15) of section 5739.02 of the Revised Code;

"(2) When the tangible personal property is purchased for a use which would exempt the sale of such tangible personal property from the tax imposed by section 5739.02 of the Revised Code;

"(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and section 5739.02 of the Revised Code;

STATEMENT OF THE CASE.

The facts in this matter were stipulated and said stipulation is contained in the certified transcript of the record filed by the petitioner.

The petitioner, an Ohio resident, purchased a car in Florida for use in Ohio. On his return to Ohio he was refused an Ohio certificate of title until the use tax had been paid. The petitioner paid the use tax and applied for a refund of the tax so paid with the Ohio Tax Commissioner.

Said claim was denied by the Tax Commissioner and the petitioner appealed to the Ohio Board of Tax Appeals. The board affirmed the order of the commissioner and the petitioner appealed to the Court of Appeals for the Ninth Appellate District. The Court of Appeals affirmed the decision of the Board of Tax Appeals.

From this action the petitioner filed in the Supreme Court of Ohio an appeal as of right, together with a motion to certify. The appeal was dismissed February 15, 1956, 164 Ohio St., 578, and the motion to certify denied.

The petitioner now seeks to invoke the jurisdiction of this court contending that the Ohio use tax on the storage, use or other consumption in this state, violates Article I, Sections 10 and 8, of the Constitution of the United States and deprives him of equal protection of the laws and takes his property without due process of the law in violation of Section I of the Fourteenth Amendment to the United States Constitution.

ARGUMENT.

I.

The Ohio Use Tax Does Not Violate Article I, Sections 10 and 8, nor Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The petitioner contends that the Ohio use tax is discriminatory in operation as it does not apply to persons making purchases in Ohio. Ohio purchasers of tangible personal property are, however, subject to a sales tax imposed at the same rate as the use tax. Section 5739.02, Revised Code of Ohio, supra. The question presented by the petitioner is not one of first impression, having been passed on upon other occasions by this court.

Taxes upon the privilege of use, storage or other consumption within a state do not impose an unconstitutional burden on interstate commerce. *Henneford* v. *Silas Mason Co.*, 300 U.S., 577, 57 S.Ct., 524, 81 L.Ed., 814; *Southern Pacific Co.* v. *Gallagher*, 306 U.S., 167, 59 S.Ct., 389, 83 L.Ed., 586; *Felt & Tarrant Manufacturing Co.* v. *Gallagher*, 306 U.S., 62, 83 L.Ed., 488.

The Ohio use tax is not a tax upon the operations of interstate commerce but on the privilege of use, storage or other consumption in this state after the commerce is at end. Every state by the virtue of its sovereignty has power to tax privileges exercised within its boundaries. *Curry* v. *McCanless*, 307 U.S., 357, 83 L. Ed., 1339. Once property is outside the stream of commerce and inside the confines of the state, it is subject to tax either on some or all of its attributes of ownership. *Minnesota* v. *Blasius*, 290 U.S., 1, 54 S.Ct., 34, 78 L.Ed., 131.

The petitioner recognizes the existence of the case of *Henneford* v. *Silas Mason Co.*, supra, although he expresses some doubts concerning the soundness of the decision. In *Henneford* v. *Silas Mason Co.*, supra, Justice Cardoza explains the nature of the use tax on pages 582 and 583 of the opinion:

> "Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. * * * For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or enjoyment. * * * The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. * * * A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. * * * *A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate.* * * *" (Emphasis added.)

The petitioner seems to believe that by levying both a sales and use tax on tangible personal property purchased and used in Ohio while at the same time levying only a use tax on tangible personal property purchased outside Ohio for use in Ohio, a kind of tax balance would be effected. There is no evidence in this matter that the petitioner has paid any sales tax in the state of purchase. Since the petitioner did not show or allege a tax paid in a foreign state, the question of discrimination is not present. *Southern Pacific Co.* v. *Gallagher*, 306 U.S., 167, 172.

That a state is not required to tax every incident of ownership alike to have equality is shown by the foregoing discussion. The exemption from the use tax of tangible personal property on which the Ohio sales tax has been

paid does not violate Section I of the Fourteenth Amendment to the Constitution of the United States. A taxing act is not invalid because the exemptions allowed are greater than the Legislature need make them. *Henneford v. Silas Mason Co.*, 300 U.S., 577, 587.

The petitioner has been subjected to no greater burden as a consequence of ownership because of his purchase outside Ohio than a person purchasing inside Ohio. The petitioner has not been deprived of equal protection of the laws nor his property been taken without due process of law.

II.

The Second Question Raised by the Petitioner Was Not Necessarily Involved in the Decision of the Ohio Supreme Court.

The petitioner complains that the manner of collection of the use tax deprived him of his property without due process of law, deprives him of equal protection of the laws, and amounts to duress.

It is the opinion of the respondent that the action of the clerk of courts is not in issue. The petitioner chose to contest this matter by seeking a refund of the use tax paid, rather than by mandamus of the clerk of courts.

The only issue before the Ohio courts was whether there had been an illegal or erroneous payment of the use tax. The fact that the tax was paid prior to review does not deprive petitioner of due process, as on the refund application he has the right of review not only by the taxing authority but by the Board of Tax Appeals and the courts of this state.

Further, the action of the clerk applies to title to motor vehicles purchased in Ohio as well as outside this state so that there is no discrimination or denial of equal protection. See Section 4505.06, Revised Code of Ohio, supra.

CONCLUSION.

It is submitted that the decision of the Supreme Court of Ohio is in accordance with prior decisions of this court and the questions that are properly presented by the petition do not present new matter and do not raise a debatable constitutional question.

Wherefore, respondent prays that the writ of certiorari be denied.

Respectfully submitted,

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Attorneys for Stanley J. Bowers, Tax Commissioner.